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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. 467

DAVID LEE FLOWERS, *Petitioner*

vs.

NANCE EXPLORATION COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, Texas

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To The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, Texas

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

David Lee Flowers here prays that a Writ of Certiorari be issued to review the final decree of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at El Paso, Texas, reversing and rendering the judgment of the District Court of Upton County, Texas, the Trial Court, which was in favor of Petitioner.

I.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION IN THE CASE IN THE COURT OF CIVIL APPEALS

The Court of Civil of Appeals for the Eighth Su-

preme Judicial District of Texas at El Paso, Texas, reversed and rendered a judgment in favor of Petitioner in the Trial Court, and gave judgment for the Respondent in that Court. This case is officially reported and styled as *Nance Exploration Company, Appellant, vs. Texas Employers' Insurance Association, et al, Appellees*, 305 S.W. 2d 621. Unofficially the opinion of the Court of Civil Appeals is appended to this petition and begins at page 25 of the Appendix. The Supreme Court of Texas refused an application for writ of error, N.R.E., (no reversible error), on April 29, 1958, a certified copy of which disposition is appended hereto at page 23 of the Appendix. A Motion for Rehearing of Application for Writ of Error was overruled by the Supreme Court of Texas on July 23, 1958, a certified copy of which disposition appears at page 23 of the Appendix.

The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas, is thus the highest Court of this State in which a decision can be had within the meaning of 28 U. S. C. A., Section 1257.

II.
JURISDICTION

Jurisdiction to grant this petition is sustained by *Title 28, U. S. C. A., Section 1257, Subsection (2)* and *Title 28, U. S. C. A., Section 2101, Subsection (c)*.

Jurisdiction of this Honorable Court is invoked by virtue of the 14th Amendment to the Constitution of the United States guaranteeing a litigant due process

of law and equal protection of the laws as a citizen of the United States and the State of Texas, Petitioners having been denied the same by the decree of the Court of Civil Appeals at El Paso, Texas, of July 21, 1957, followed by a denial of Petitioner's motion for rehearing on October 2, 1957, and a subsequent refusal by the Supreme Court of the State of Texas, to grant an Application for Writ of Error on April 29, 1958, and again on July 23, 1958.

III.
QUESTIONS PRESENTED

1. Whether the refusal of the inferior Court of Civil Appeals denied Petitioner due process of law and/or equal protection of the laws in refusing to recognize and follow the decision of this Honorable Supreme Court of the United States in *Gibson vs. Phillips Petroleum Co.*, 352 U.S. 874, 77 Sup. Ct. 16, 1 L. Ed. (2) 77, where the same substantial set of facts existed and where the same points of law were before the Court for construction and application.

2. Whether the Court of Civil Appeals denied the Petitioner due process of law, and or equal protection of the laws by accusing the Honorable Supreme Court of the United States of deciding the *Gibson* case, supra, without giving any "rhyme or reason" for its action.

3. Whether the Court of Civil Appeals denied the Petitioner due process of law, and or equal protection of the laws in following the 5th Circuit's opinion rather than the opinion and disposition made by this Honorable Court in the *Gibson* case, and in stating as

a general proposition that that Court (that is, the Court of Civil Appeals) was not bound by Federal decisions. This is presented as a question for review because the history of the Gibson case and the disposition made by the 5th Circuit clearly shows and exemplifies that this Honorable Court's action in the premises was based upon a denial of due process of law or denial of equal protection of the laws or both.

4. Whether the Court of Civil Appeals denied petitioner due process of law and or equal protection of the laws when it failed to sustain a recovery and judgment in favor of Petitioner based upon the clear cut holding and opinions of the Supreme Court of the State of Texas, involving identical sets of facts and in which recoveries were sustained in favor of the injured parties who had initiated the litigation and in which cases the injured parties were protected by the laws of the State of Texas. Those cases are as follows:

(1) *Galveston-Houston Electric Railway Co. vs. Reinle*, 258 S.W. 802. (decided in 1924)

(2) *Smith vs. Henger*, 226 S.W. 2d 425. (decided in 1951)

(3) *Triangle Motors of Dallas vs. Richmond*, 258 S.W. 2d 60. (decided in 1953)

(4) *Walgreen Texas Company vs. Shivers*, 154 S.W. 2d 625. (decided in 1941)

(5) *McAfee vs. Travis Gas Corp.*, 153 S.W. 2d 442. (decided in 1941)

IV.
STATEMENT OF THE CASE AND FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

This suit was one at common law for the negligence of Respondent resulting in horrible mutilation of the Petitioner's body including a loss of his legs below his knees and almost the entire loss of the use of his right arm. The facts giving rise to the lawsuit are as follows: Respondent was a general contractor engaged by Gulf Oil Corporation to make seismograph tests for Gulf Oil Corporation to determine the possibility of oil bearing deposits in Upton County, Texas. Petitioner was working for a subcontractor or independent contractor under the general contractor, whose duty it was to locate and stake the shotholes where the petitioner and his co-employees were to drill. As the general contractor it was the duty of the respondent to furnish the Petitioner a reasonably safe place in which to work and to warn him of known existing dangers with which he was unfamiliar. Respondent's agent, servant and employee surveyed the location for the shotholes to be drilled within three or four steps of electrical highline wires carrying 66,000 volts of electricity and which highline wires were lower than the top of the drilling mast when the same was in an upright position. All of this was well known to the Respondent, who under Texas law, owed the same duty to Petitioner as does a master to a servant, relative to warning him of dangers and providing him a reasonably safe place in which to work. In the process of drilling the shotholes, which would consume two or three

minutes, the mast came in contact with the highline wires through no agency of the Petitioner at such a time as when he was behind the truck on which the drilling mast was located and putting dynamite into the shotholes with a piece of wire. As a result of the mast coming in contact with the 66,000 volts of electricity the Petitioner received horrible injuries, burning his feet and legs below the knee to the extent that after being packed in ice for 21 days it was necessary that both legs be amputated below the knees. Under this set of facts the case was submitted to a jury pursuant to the Texas Rules of Civil Procedure and the Texas Constitution guaranteeing the right of a trial by jury, and the jury, based upon sufficient evidence of probative force found the Respondent gulity of negligence resulting in Petitioner's injuries and absolved the Petitioner from any act of contributory negligence.

Damages totaling $145,051.00 as a result of Respondents negligence was assessed and divided $127,671.11 to Petitioner and $17,379.89 to Texas Employers' Ins. Assn., who had intervened to recoup the amount they had paid as the Workmen's Compensation Carrier for Petitioner's immediate employer. The money was divided in the judgment according to the existing rules of Texas with regard to subrogation claims and the Respondent appealed the case to the Court of Civil Appeals at El Paso, with the resulting opinion heretofore referred to.

The primary negligence of which the Respondent was found guilty was in staking the shotholes within

three or four steps of the high line wires, and in failing to warn the Petitioner of the danger of the high-line wires and the fact that they were not cut-off and in failing to request a cutoff of the electricity.

V.

MANNER IN WHICH THE FEDERAL QUESTION WAS FIRST RAISED AND THE DISPOSITION OF THE SAME

After the Court of Civil Appeals in El Paso had handed down the Opinion attached to this Petition, Petitioner filed his Motion for Rehearing and by assignments of error to the holding of the Court of Civil Appeals, set forth the following separate and distinct Assignments of Error:

(1) The Court Erred in holding that the rule announced in *Phillips Petroleum Company vs. Gibson*, 232 Fed. 2nd 13, was the rule which this Court "chooses to follow" in spite of the fact that this case had been reversed and rendered by the Supreme Court of the United States. (Assignment of Error No. 4).

(2) The Court Erred in holding that the Supreme Court of the United States set aside the holding of the Circuit Court in *Phillips Petroleum Company vs. Gibson*, 232 Fed. 2nd 13, without "rhyme or reason." (Assignment of Error No. 5.)

(3) The Court erred in citing the Gibson case with approval since the holding in such case has been reversed and rendered by the Supreme

Court of the United States and in following the holding in such case this Court has denied the plaintiff due process of law by denying him a jury trial and by substituting its own findings of fact for those found by the jury. (Assignment of Error No. 6).

(4) The Court Erred in refusing to honor the well recognized mandate, as exhibited by Opinions of the Supreme Court of Texas and the Supreme Court of the United States, not to substitute its own findings of facts for those of the jury and thereby become the triers of fact rather than the jury. (Assignment of Error 18)

After these assignments of error had been made on the Motion for Rehearing bringing into play the Federal questions referred to, the Court of Civil Appeals in El Paso denied the Petitioner's Motion for Rehearing and the Supreme Court of the State of Texas refused to review the case. These matters appear in the record under the certificate of the Clerk of Court of Civil Appeals in El Paso in Petitioner's Motion for Rehearing in the Court of Civil Appeals which is brought forth as part of the record in this case.

VI.
AUTHORITIES FOR THE REASONS RELIED UPON FOR THE GRANTING OF THIS WRIT OF CERTIORARI

In 1924 in the *Reinle* case, and by certified questions directly in line with the points involved in this petition and the points involved before the Court of

Civil Appeals in El Paso, the Supreme Court of the State of Texas laid down the rule of law by which not only the Trial Court was to be governed but also the intermediate appellate courts of the State of Texas designated as the Courts of Civil Appeals. In order to point out with clarity that the El Paso Court of Civil Appeals has engaged in such an arbitrary and capricious exercise of judicial power so as to deny the petitioner equal protection of the laws within the meaning of the 14th Amendment of the Constitution of the United States, Petitioner again makes reference to that portion of the Court of Civil Appeals Opinion which states that there can be no recovery by the Petitioner because no duty was owed to him by Respondent. Under an identical set of facts the Supreme Court of the State of Texas had said otherwise in 1924 when an intermediate Appellate court of the State of Texas certified the "duty" question to the Supreme Court of the State of Texas and it was answered affirmatively.

As will be shown in the cases hereinafter listed as reasons for the granting of this writ, this law remained the law and is still the law within the state of Texas as this Court has previously recognized in the *Gibson* case, supra, and therefore it can readily be seen that the only recourse open to Petitioner to obtain equal protection under the laws is to invoke the jurisdiction of this Court as was done in the *Gibson* case. The same set of facts and the same pointed law are now before this Court, the only difference being that the *Gibson* case was instituted in Federal Court and Petitioner's case was instituted in the State

Court. However, State law is involved in both cases and there is equal, if not more reason for the granting of this writ as was present in the *Gibson* case. Petitioner is firmly convinced that there must be a recourse for an unwarranted arbitrary and capricious exercise of power by an intermediate appellate court and such is doubly true when such intermediate appellate court has acted as they have done in this case, and accused this Honorable court of acting without rhyme or reason.

Petitioner now points out to this Honorable Court, other cases as subsidiary of the main points requiring the granting of this writ and stresses further the undisputed applicable substantive law of the State of Texas necessary to a determination of this issue. Petitioner refers to *Smith, et al, vs. Henger*, 226 S.W. 2d 425, in which it is stated (the legal relationship of the parties being the same), that a general contractor is in the position of an owner and occupier of the premises thereby bringing about his duty to make, inspect, and keep the premises safe for the employees of a sub-contractor or independent contractor. This rule of law is not to be confused, although it has been confused by the Court of Civil Appeals in El Paso, with that rule of law which states that the general contractor is not liable for the acts of the sub-contractor or independent contractor in the absence of the danger being intrinsically or inherently dangerous. This last rule of law does not absolve the general contractor from its own acts of negligence, witness the holding in the *Smith* case and *Reinle* case, supra.

Petitioner is in no position to state exactly why the Court of Civil Appeals chose to deny a recovery when the law dictated that a recovery for him should be sustained. The fact remains that they did deny him a recovery contrary to the existing law. This Petition is immeasurably strengthened by an admission made by the Respondent and its lawyers prior to the time this Court held as it did in the *Gibson* case. By way of explanation we would point out that at the time this case was submitted to the Court of Civil Appeals in El Paso, the Fifth Circuit's opinion in the *Gibson* case was outstanding and the only opinion that had been written thereon. Acknowledging the precedent value as presented by the fact situation in the Gibson, and acknowledging that the same law that governed the Gibson case would and should govern the disposition to be made in this case, Respondent in the Court of Civil Appeals (who was at that time the Appellant) argued vociferously that the *Gibson* case was governing and that the Fifth Circuit had reversed a judgment in the injured party's favor and given judgment to the defendant. Before the Court of Civil Appeals in El Paso wrote their untenable and capricious opinion in this case, it was pointed out that in the interim the Supreme Court of the United States had reinstated the judgment for *Gibson* and allowed him to recover based upon Texas law. Beyond dispute this Honorable Court was of the opinion that Gibson had been denied equal protection of the laws and/or denied due process of the laws within the meaning of the 14th Amendment of the Constitution of the United States. Then, faced with such a decision by this Hon-

orable Court and bound and determined to deny Petitioner one red cent, the Court of Civil Appeals had to side-step the opinion of this Court in the *Gibson* case and recognized that they must evade and void this holding in view of Respondent's admission that the facts were governing. Petitioners' question therefore, is whether it is judicially sound reasoning for an inferior court to state that they do not choose to follow the Supreme Court of the United States opinion in this regard, but choose to cite the Fifth Circuit's opinion with approval and use that as a rule and guide even though such opinion was reversed and rendered by this Honorable Court. If such evasion and if such flaunting on the part of the Court of Civil Appeals in El Paso cannot be tolerated and if Petitioner was not accorded the same protection of the laws as were other injured parties in the same type of fact situation and if Petitioner's remedies have been exhausted in the State Courts to correct such a situation, then no alternative exists but to ask this court to compel equal protection of the laws by its mandate to the Court of Civil Appeals in El Paso.

In the *Henger* case, supra, we find this language.

> "Where the duty to keep premises in a safe condition is imposed on a person in control of them, this duty may include the duty to inspect the premises, to discover dangerous conditions. R. E. Cox Dry Goods Co. vs. Kellog, Tex. Civ. App., 145 S.W. 2d 675, writ ref. Hinthorn vs. Benfer, 90 Kan. 731, 136 Pac. 247, L.R.A., 1915 B 98; Kiehling vs. Humes, Deals Co., Mo. App. 16 S.W. 2d 637; to provide coverings or guard rails or similar devices to protect persons law-

fully on the premises from a harm, Kirby Lumber Co. vs. Hamilton, Tex. Civ. App., 171 S.W. 546, Writ Ref.; Carlson vs. Associated Realty Corp., 114 Conn. 699, 159 A. 885; Perry v. Davis and Sargent Lumber Co., 215 Mass. 338, 102 N.E. 320; or to warn such persons of the existence of dangers which could not reasonably be expected to be apparent or obvious, Gardner vs. Waterloo Cream Separater Co., 134 Iowa 6, 111 N.W. 316; Restatement of Torts, 343; 38 Am. Juris., Negligence, 96. The standard by which this duty is measured is that of reasonable care and whether the duty has been properly discharged depends on the facts of each case."

In the *Reinle* case, we find this language:

"There is no doubt that the independent contractor was under the duty to exercise ordinary care to give warning to its employees of the dangers incident to their work from the proximity of the appliances with which they were required to labor to the deadly electric current carried by the Interurban Company wires. Breach of this duty is not the basis of the Interurban company's liability It is the breach of the Interurban company's own independent duties for which it is answerable. Failure of the contractor to perform its duty would in no wise relieve the interurban from responsibility for the consequences of failing to perform its own duty to the contractor's employees. The reason for the employer's liability for an injury occasioned like Reinle's is stated in Cooley on Torts to be 'If I employ a contractor to do a job of work for me which in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible, for I cause acts to be done which ac-

tually expose others to injuries.' 2 Cooley on Torts, (3rd addition) page 1091. *The Court answers that it was the duty of the Interurban Company to exercise ordinary care to give Reinle notice or warning of the danger of the boom coming in contact with, or in close proximity to, the uninsulated high voltage wires, notwithstanding that Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger.*" (Emphasis ours)

In *Triangle Motors of Dallas vs. Richmond*, 258 S.W. 2d 60, a very similar case with respect to the legal status and liabilities of the parties and a case in which the Supreme Court of the State of Texas pronounced the law to be antagonistic to the result reached in Petitioner's case in the Court of Civil Appeals we find this language:

"A proper determination of these law questions must hinge on an acceptance of the evidence and inference therefrom in their aspects *most favorable to the plaintiff's* case and to disregard contrary evidences and inferences. We cannot say as a matter of law that his choice of the elevator shaft under the circumstances was not reasonably forseeable by the defendant. The rule contended for by the defendant was announced and applied in the case of Houston National Bank vs. Adair, 207 S.W. 2d 374. But each case must be decided on its peculiar facts and therein lies the distinction between the Adair case and this case. The defendant says that if the plaintiff had been exercising ordinary care and prudence he would have observed as he left the elevator the day before that the building had more than two stories,

and that he also should have known that what he saw when he looked below was not the floor of the elevator because it did not in fact look like the floor of an elevator. *But these are matters for consideration by the jury, with equal force it could be said of the plaintiff's conduct in the case of T. & P. Ry. Co. vs: Day, 197 S.W. 2d 332, that he should have known better than to start across railway tracks when warning lights were flashing; or in the case of Lang vs. Henderson, 215 S.W. 2d 585, that he should have known not to remain in an apartment in which he knew there had been a gas leak for some two months; Or in Blanks vs. Southland Hotel Co., 229 S.W. 2d 357, that he should have known not to try to go down a dimly lighted stairway at nighttime; or in the case of Walgreen Texas Co. vs. Shivers, 154 S.W. 2d 625, that she should have known not to try to leave the Soda fountain until she could see that she could step away with safety; Or in the case of Renfro Drug Co. vs. Lewis, 235 S.W. 2d 609, that he should have known of the dangerous conditions of steps she was about to use with a warning sign on the door. But in each case, and in all of these cases, this Court has held to the question of contributory negligence to be one of fact for the trier of the facts. We do not believe that this court would be justified in saying, as a matter of law, that the conduct of the plaintiff in the instant case was more unreasonable or more lacking in due care for his own safety than was the conduct of the last plaintiff in the cases.*" (Emphasis ours)

The summation of the cases just cited and quoted from would be as follows:

1. The primary issues in the case was the primary

negligence of the defendant and whether there was contributory negligence on the part of the plaintiffs.

2. Whether the facts of the case would justify the holding of the appellate courts, contrary to the holding of the jury, that as a matter of law the plaintiff's were guilty of some facet of contributory negligence.

3. That the appellate courts under Texas procedural and substantive law are not allowed to usurp the functions of the jury and find facts on their own unless reasonable minds could not differ.

4. That all contrary inferences and evidence must be disregarded by the Courts in searching the record to see whether there is any evidence to support the findings of the jury and if there is such evidence after disregarding all other testimony, then the verdict must stand as found by the jury.

Therefore, the question in our case was whether there was any evidence in the record to sustain the jury finding that petitioner did not know or fully realize and appreciate the dangers of working at the place where he was injured and in deciding this question we must turn again to the holding of the *Henger* case, which said he had the right to assume that the premises had been made safe for his use. The further point is made, that if, under similar fact situations, the Supreme Court has declared in several cases that liability did exist, which is all we have to go by, then an antagonistic holding without any basis therefor by the Court of Civil Appeals in El Paso can be nothing other than a denial of due process and equal protec-

tion of the laws. In other words, the same law applicable to all the injured parties in these cases just cited should apply with equal force to petitioner, and actually with even more force because the fact situation to sustain a holding of liability is much stronger as evidenced by a comparison of the two situations.

We well recognize the fact that in answer to this Petition Respondent will again cite the case of *McKee vs. Patterson*, 271 S.W. 2d 391, as authority for their contention. Suffice it to say that this Honorable Court has already had occasion to review this case in connection with whether or not to allow the plaintiff a recovery in the *Gibson* case, and ruled impliedly that the *McKee* case was not in point and not applicable to the fact situation, or struck the doctrine down altogether. In either event, if the *McKee* case was not applicable for any reason to the *Gibson* case then certainly it is even less applicable to our fact situation, because Gibson, from a legal view point was in much more jeopardy of being held contributorily negligence as a matter of law than was the petitioner in the case at hand.

For whatever it is worth in deciding this case and for a further explanation of the jurisprudence of the State of Texas, we point out that the Texas Constitution in Art. 1, Sec. 15, guarantees a right of a trial by jury. Also, an almost identical fact situation to ours and to the *Reinle* case heretofore cited, we would cite *Revels vs. Southern Calif. Edison*, 248 Pac. 2nd 968, in which the highest Court in California allowed a recovery under that fact situation, which as stated

is almost identical to ours. We realize that this case would not be governing as far as substantive Texas law is concerned but adds emphasis to the fact that the common sense view point, dictates that under favorable jury findings a recovery should and can be had under these facts.

There are a wealth of Texas cases dealing with various and sundry subsidiary questions in cases similar to ours but Petitioner feels that it is unnecessary to burden the Court with even citing these authorities for this reason: There is no need to draw upon holdings of cases which would or could be classed as dictum and which are really unnecessary to deciding the main question in this case, and that is whether there has been a denial of equal protection of the law. It is thought, and Petitioner firmly believes, that the cases cited can instantly be recognized as being from the Texas Supreme Court in fact situations where there can be no just distinction. There are no cases to the contrary by the Supreme Court or any intermediate appellate courts in Texas jurisprudence, a holding of no liability to the plaintiff in the *McKee* case notwithstanding.

Respondent has relied upon a holding of the Court of Civil Appeals in El Paso, wherein a different fact situation is involved, but in which opinion the Court nevertheless actually recognized the true rule of law that should be applied in the case at hand and we would cite this language for authority for this statement in the case of *Texas Electric Service vs. Holt*, 249 S.W. (2d) 662.

"The employer may be liable for injuries sus-

tained by the independent contractor's employees in cases where the employer furnishes them defective machinery; and unsafe space or place for such machinery to be used as outlined in cases of Continental Paper Company vs. Bosworth, Tex. Comm. App. 276 S.W. 170 and Burton Lingo Co. vs. Armstrong, Tex. Civ. Appeals, 116 S.W. 2d 791, writ ref. also 23 Tex. Juris. page 568, Sec. 21; or in those cases where an owner or employer in maintaining electric wires over which a high voltage of electricity is conveyed knowingly permits an unskilled employee of an independent contractor to work so close to said wires as to become dangerous, without notifying said employee of the danger, as was held in the cases of West Texas Utilities Company vs. Renner, Tex. Comm. App., 53 S.W. 2nd 461; Galveston-Houston Railway Co. vs. Reinle, 113 Tex. 456, 258 S.W. 803, relied upon by appellees. This law placing upon an owner or employer to use reasonable care to use and make and keep the premises safe for use of business invitees also burdens the general contractor with the duty to use due care to provide a safe place for employees to work on the premises including employees of said contractor. Smith vs. Henger, 226 S.W. 2d 425, 20 A.L.R. 2nd 853, relied upon by appellees."

We reiterate that the Holt case is a case cited by Respondent in its brief before the Court of Civil Appeals in El Paso, and which, they said, reached a contrary result to Petitioner's contention. At the same time we would point out the above language which in every respect bears out the contention made by Petitioner in that Court and in this Court.

It is anticipated that Respondent would challenge this Court's jurisdiction to even review this case and in anticipation thereof petitioner would point out the language of Mr. Chief Justice Vinson in *Shelly vs. Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836, 844, 92 L. Ed. 1161, 3 A.L.R. 2nd, 341, recognizing the Federal question involved where a litigant has been denied due process of law and equal protection of the laws within the meaning of the 14th Amendment, even though substantive common law formulated by State Courts is involved:

> "It has been recognized that the action of State Courts in enforcing a substantive common law formulated by those courts, may result in the denial of the rights guaranteed by the 14th amendment even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."

Also in *Brown vs. Board of Education of Topeka*, 347 U.S. 483, 74 Sup. Ct. 686, 691, 98 L.Ed. 873, we find this language:

> "Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Certainly it would serve no purpose to try to delve into the personal motives of the Court of Civil Appeals and members thereof in deciding the case as they did, but it is quite apparent from the reading of their opinion that the writer of the opinion was personally embittered against the highest court in this

land as exhibited by the reasoning process used by him in his dogmatic determination to refuse to follow the Texas law as construed by the highest Court in the State and by the Supreme Court of the United States. Never in the history of all our jurisprudence has there been such a flagrant abuse and disregard of proper judicial function and recognition of the opinions of the higher courts. The principal result, regardless of the motives, is that there has been a denial of equal protection of the laws as far as Petitioner is concerned which can only be corrected by this Honorable Court granting this Petition, taking jurisdiction of this matter to assure Petitioner and anyone else who is interested enough in the question, that there is a breath of life in the Constitutional provision that a person cannot be denied equal protection of the laws, rectify the tragic wrong that has been committed against Petitioner and reverse and render the judgment in his favor or alternatively remand the same to the Court of Civil Appeals of the State of Texas with instructions that they do so.

For this action in the interest of justice Petitioner so respectfully prays.

Respectfully submitted,

HUFF & SPLAWN
P. O. Box 506
Lubbock, Texas

By Forrest Bowers, of Counsel
Forrest Bowers
Attorneys for Petitioner

A true and correct copy of the above and foregoing is being mailed this the 21st day of October, A. D., 1958, to Mr. Bill Kerr, Turpin, Kerr & Smith, attorneys for Respondent, Midland, Texas.

HUFF & SPLAWN
P. O. Box 506
Lubbock, Texas

By Forrest Bowers, Jr. Counsel
Forrest Bowers
Attorneys for Petitioner

APPENDIX

April 16, 1958

IN THE SUPREME COURT OF TEXAS

No. A-6567

David Lee Flowers

vs.

Nance Exploration Company

From Upton County,
Eighth District

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the Eighth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicant, David Lee Flowers, pay all costs incurred on this application.

July 23, 1958

No. A-6567

David Lee Flowers

vs.

Nance Exploration Company

From Upton County,
Eighth District

This day came on to be heard petitioners; motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment on application for writ of error and order on motion for rehearing of application for writ of error of the Supreme Court of Texas, in the case numbered and styled as above, as the same appear of record in the minutes of said Court.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 23rd day of July, 1958.

GEO. H. TEMPLIN, Clerk
By s/ Jewell Seeliger, Deputy

No. A-6567

David Lee Flowers
vs.
Nance Exploration Company

CERTIFIED COPY OF JUDGMENT
OF THE SUPREME COURT OF TEXAS
ON APPLICATION FOR WRIT OF
ERROR

(REFUSED—N. R. E.)
FILED IN
COURT OF CIVIL APPEALS
July 29, 1958

E. J. Redding
Clerk 8th District

[SEAL]

COURT OF CIVIL APPEALS
EL PASO

No. 5226

Nance Exploration Company, Appellant,
vs.
Texas Employers' Insurance Association, et al, Appellees.

Appeal from the District Court of Upton County.

OPINION

The nature of this case is succinctly stated by the appellee, as follows:

> "This is what is commonly designated as a third party suit instituted by appellee David Lee Flowers against Nance Exploration Company, West Texas Utilities Company and Gulf Oil Corporation in the 83rd District Court of Upton County, Texas. Texas Employers' Insurance Association intervened to recoup the amount of money paid by it to David Lee Flowers pursuant to the policy of Workmen's Compensation Insurance issued to D. A. Peachee Drilling Company, appellee's employer at the time of the accident.
>
> "D. A. Peachee Drilling Company, appellee's employer, had entered into a contract with appellant to do certain seismograph work in and around Upton County, Texas, for and on behalf of Gulf Oil Corporation. While engaged in such work the mast on the drilling rig operated by D. A. Peachee Drilling Company came into contact with an electric power line carrying 66,000 volts of electricity causing injuries to the plaintiff resulting in amputation of both legs below the knee as well as almost complete loss of use of

his right arm. After all parties had closed, the trial court instructed a verdict in favor of Gulf Oil Corporation and West Texas Utilities Company and submitted the case to the jury as against Nance Exploration Company alone.

"Based upon favorable answers to the issues as submitted to the jury the trial court entered judgment for David Lee Flowers in the sum of $127,671.11 and in favor of the intervenor, Texas Employers' Insurance Association in the sum of $15,879.89, plus interest and costs and $1500 attorneys fees for the intervenor. From such judgment Nance Exploration Company has appealed."

The record in this case is quite voluminous, consisting of some 800 pages, and there are approximately 200 typewritten pages of briefs filed by each party. Appellant sets up 39 points of error.

Since we are to hold that several facts are established as a matter of law, it is necessary that we give a rather full summation of the evidence. This we take from appellant's Statement of Facts, to which appellee concurred.

The accident happened on land owned by the University of Texas. West Texas Utilities Company owned a right of way granted by the University for the construction and maintenance of a 66,000 volt H-frame electric transmission line, which land was under an oil and gas lease from the University to Gulf Oil Corporation. Gulf Oil Corporation entered into a contract with appellant, a seismograph exploration company, whereby appellant agreed to conduct

seismograph surveys for Gulf. Appellant, Nance Exploration Company, in turn contracted with D. A. Peachee Drilling Company for the drilling of the pattern shot holes. Appellee was employed by Peachee Drilling Company as a driller's helper. It therefore seems that appellant stood in the position of the general contractor, and Peachee Drilling Company, as a sub-contractor, and it likewise seems quite clear that each operated as an independent contractor. Neither supervised the work of the other. Appellant's surveyor located where the holes should be drilled, and Peachee Drilling Company agreed to drill them. Some of the holes were on the north side of the fence line, and some on the south side. The power line was of standard H-frame construction, each H-frame consisting of two high poles with cross braces, and with three heavy, uninsulated wires fourteen feet apart. Peachee Drilling Company's crew consisted of a Mr. Bailey, who was overseer or foreman, Mr. Greer, who was the driller, and appellee, Flowers, who was the driller's helper. After they had drilled eight holes on the north side of the fence, the drilling truck, which consisted of a regular truck with a 35-foot mast, was moved to the south side of the fence; and in order to make this move, the mast was lowered so that the truck could be driven under the highline. Appellee drove the truck in this operation and, after seven holes had been drilled on the south side, he drove the truck to the eighth and last south side hole. In moving from to hole, the mast was left up, but to go under the highline, it had to be lowered, as it extended 35 feet into the air when up, and the power line was not this high from the ground. Appellee testified that as he drove

the truck up to the last hole, Greer was directing him and was looking up at the power line, and that he himself opened his cab door and looked up at the power line. He further testified that he knew it was a high power line, and knew that it was more powerful than the wires you see around town. He also testified that there was nothing to keep him from seeing the line; that he noticed the highlines when he arrived at the location; that he realized they were high power lines; that he realized that before the accident; that the wire didn't look like it had rubber wrapped around it. He also testified that said wire was slightly larger than a fountain pen. It is undisputed that even this last, the sixteenth hole, was drilled without incident, and appellee test.. ed in this connection:

> "A 'Yes, the mast, he was going to let it down like that (indicating) and when he did, why it hit the highline.'
>
> "Q I said, 'Now, actually, if he hadn't of let that mast down, you would have gotten in the truck, backed off and never had any trouble?', and what did you say?
>
> "A 'That's right.' "
>
> * * *
>
> "A 'I was putting it in the hole and the driller was letting down the mast.'
>
> "Q 'I see. Now, the driller there, standing beside you, let the.....', and what did you say?
>
> "A 'The mast down.'
>
> "Q And, I asked you: '—was letting the mast down? And, when he did, the mast—', and what did you say?
>
> "A 'Hit the highline and that's what happened.' "

In another place appellee testified that the only way the accident could have happened was for his helper, Greer, to have let the mast down into the wire.

On the question of notice, or obviousness of the danger, Bailey testified that while Greer was drilling the first hole, he and appellee walked out to the power line, and that he, Bailey, told Flowers that they could not pull forward on those holes, but would have to back up, because the highline was too close; that they would have to be careful not to go over the shot point; and that they talked about the highline, and he cautioned appellee. He further testified that he cautioned Greer, and told them they would have to back away from the power line before they could fold the mast. Appellee denied receiving this warning, but it is undisputed that Bailey, the foreman, realized the danger; and that he told Greer of it. It is likewise undisputed that Bailey, Greer and appellee all worked for Peachee Drilling Company, Bailey being the foreman, Greer the driller, and appellee the driller's helper.

At the close of the evidence, the appellant presented a motion for instructed verdict, setting up all the defenses now urged. He likewise duly objected to the negligence issues on the grounds of no evidence of breach of duty, and no evidence on negligence, but all such objections were overruled:

> "In response to special issues submitted by the court, the jury found that this appellant was negligent in failing to provide Flowers a safe place to work (S. I. Nos. 1 and 2), in ordering, instructing or requiring Flowers to work near an electric power line carrying high voltage electri-

city (S. I. Nos. 4 and 5), in failing to warn Flowers that he was being required to work in an intrinsically and inherently dangerous place (S. I. Nos. 7 and 8), in locating the place where the hole was to be drilled where Flowers was injured (S. I. No. 10), in ordering, instructing or requiring Flowers to work in an intrinsically and inherently dangerous place (S. I. Nos. 12 and 13), in failing to request West Texas Utilities Company to stop the flow of electricity through the electric power lines (S. I. Nos. 15 and 16), and in failing to warn Flowers that they had failed to request West Texas Utilities Company to stop the flow of electricity through the electric power lines (S. I. Nos. 18 and 19)."

After return of the verdict, appellant filed its motion to disregard the above findings on the grounds of no evidence and no duty, and also filed its motion for judgment n.o.v., setting out the points of error now urged. Though duly presented, both motions were overruled by the trial court. All of the foregoing rulings of the court were assigned as error in appellant's motion for new trial.

Under the undisputed evidence in this case, including appellee's testimony, we conclude, as a matter of law: (1) that the danger inherent in this high power electric line was open and obvious; (2) that appellee knew of and realized the danger; (3) that as a matter of law he was charged with the danger, whether he realized it or not.

The law of Texas seems to be well settled in this regard by the Supreme Court in Robert E. McKee, General Contractor, v. Patterson (1954), 271 S.W.

(2) 391, wherein it is said:

"There are certain qualifications not there expressed. It is now well established in this state that the duty as there expressed does not extend to those invitees who know or should know of the existence of the particular condition and who appreciate or should appreciate its dangers. Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497; A. C. Burton Co. Inc., v. Stasny, Tex.Civ.App., 223 S.W.2d 310, writ refused; Houston National Bank v. Adair, 146 Tex. 387, 207 S.W.2d 374; Hausman Packing Co. v. Badwey, Tex.Civ.App., 147 S.W.2d 856, writ refused; Marshall v. San Jacinto Bldg., Tex.Civ. App., 67 S.W.2d 372, writ refused. What the qualification means, of course, is that inasmuch as the invitee has knowledge of the dangers there is no duty on the owner to warn him of them. It means also that if, having knowledge of the dangers, the invitee exposes himself to them he must take the premises as he finds them and there is no duty on the owner to protect him even by the use of reasonable precautions to eliminate the hazards."

It further says:

"In determining liability, under the defense of voluntary exposure to risk, it is said that one cannot recover for injuries sustained while voluntarily exposing himself to a danger which he either does or should fully realize and appreciate. 38 Am.Jur. 845 et seq., Negligence, Secs. 171-173; 65 C.J.S., Negligence, Sec. 174, p. 848; Levlon v. Dallas Ry. & Terminal Co., Tex.Civ.App., 117 S.W.2d 876, writ refused; Wood v. Kane Boiler Works, 150 Tex. 191, 238 S.W.2d 172,

174; Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607, 610."

Another excerpt is:

"In this case we may say without any doubt that the defendant through its superintendent knew of the slick condition of the floor."

This case was rather recently followed by the Fifth Circuit Court of Appeals at New Orleans, in Phillips Petroleum Co. v. Gibson (1956), 232 Fed. (2) 13. In that case it is said:

"The qualification above noted, to the general rule of duty to use ordinary care to protect invitees from injuries resulting from unsafe condition, exists only when the invitee, confronted with the existence of a condition of which he knows and containing dangers which he appreciates, voluntarily encounters them. We hold that Gibson here made such a choice, voluntarily encountering the danger, and consequently, under Texas law, appellant breached no duty to him."

True it is that the Supreme Court of the United States, in a very recent per curiam opinion (1 L.Ed.2d 77), without giving any rhyme or reason for its action, set aside the holding of the Circuit Court in this case. Appellee relies strongly on this action and insists that the United States Supreme Court has "thereby struck down the doctrine in the McKee case." We disagree. It is impossible to determine from the Supreme Court opinion why it took this action. It cannot be determined if it thought the Texas law was wrong, or if it thought that the Fifth

Circuit had wrongly applied it. Be that as it may, we are not bound by Federal decisions in this case. On the contrary, Federal courts are supposed to follow State decisions. Gibson case, supra, at page 78. We consider the Fifth Circuit opinion well reasoned and in accord with the Texas decisions, by which we are governed. Federal cases are used by us as persuasive, but not decisive. In this case, we choose to cite with approval the Fifth Circuit's opinion.

Very recently this court, in Oaxaca v. Lowman, (C. A. El Paso, 1956), 297 S.W.(2) 729. held, in a situation very similar to this one and for reasons similar to those in this case, that the employer was not liable. The Supreme Court has just recently refused a writ of error (n.r.e) in that case, thereby re-affirming the holding in the Patterson and Gibson cases, supra. See also:

Sears, Roebuck Co. v. Robinson, 280 S.W (2) 238 (Tex.Sup.Ct. 1955);

McElhenny v. Thielepape, 285 S.W. (2) 940 (Tex.Sup.Ct. 1956);

Gulf Oil Corp. v. Wright, 236 Fed. (2) 46 (C.A.5, 1956);

Moore v. The Texas Company, 299 S.W. (2) 401 (El Paso 1956).

As above stated, the appellee denied that he had received a direct warning of the danger of the electric wire and, in one place, even testified that he did not know it was carrying electricity. He did not know but what it was a telephone line. We think his argument that he was entitled to receive affirmative warn-

ing in a situation such as presented here, is without merit. In Union Tank & Supply Co. v. Kelley (C.A.5, 1948), 167 Fed. (2) 811, Judge Hutcheson, speaking for the court, said:

> "He, therefore, saw and knew everything that could have been told to him, that if the sheets were straightened up and swung over toward the north wall of the car, their weight, configuration, and size were such that if unsupported they would be bound to fall. There is nothing then in the work he was doing and the situation under which he was doing it which was not as fully known to him as to Head, nothing in the work that was inherently dangerous if it was done with reasonable care for the safety of the worker."

We think that statement could be made with equal appropriateness here. It is unthinkable that an experienced driller, such as the appellee, could see this big H-power line, running overhead, uninsulated, with wires as large as a fountain pen, and not realize that it would be instant death to touch one. It would be just as logical for him to say that he did not realize that a red-hot depot stove would burn him if he were to pick it up. Therefore, we hold that the appellee knew, or should have known, of the danger here, and therefore was not entitled to any warning, nor was he entitled to assume the lack of danger.

> Cloud v. Houston Lighting & Power Co., 199 S.W. (2) 260 (Calv.Civ.App.1947, err.ref.n.r.e.);
>
> West Texas Utilities Co. v. Dunlap, 175 S.W. (2) 749 (Eastland Civ.App., no writ noted);

McGinty v. Texas Power & Light Co., 71 S.W. (2) 354 (Dallas Civ.App.1934, err.ref.).

Furthermore, if appellee was entitled to a warning of the danger, he had received that warning because his superior, Bailey, under the undisputed evidence, knew of said danger and, under the unidisputed evidence, had warned Greer of the danger. Therefore, both of appellee's superiors knew of the danger, and, under the last quotation from McKee v. Patterson, supra, that amounted to knowledge of the danger on the part of appellee. See also:

Texas Electric Service Co. v. Holt, 249 S.W. (2) 662 (Ft.Worth Civ.App.1952, err.ref. n.r.e.).

True it is that the owner, or occupier of land owes the duty of ordinary care to the employees of its independent contractor, and virtually all of the cases cited in this opinion are to the effect that a general contractor, when in possession *and control of premises*, owes the duty to warn its independent contractor's employees of any *hidden* danger. However, we hold in this case that there was no duty on the part of the appellant to warn the appellee, because the appellant was not the owner nor occupier of the premises. He was an independent contractor under Gulf. Peachee Drilling Company was an independent contractor under appellant. Therefore, each was an invitee on the premises, but appellant had no more control over the premises than did Peachee Drilling Company. It was not the owner or occupier in control of the premises, and had no possession of or control over the land. It was merely an invitee, as was the Peachee

Drilling Company. All of the authorities we have found holding the general contractor liable under such circumstances are those where the general contractor was in possession and control of the premises and created the danger, or was in control of it:

> 65 C.J.S., 609.

The two cases, Smith v. Henger (Tex.Sup.Ct.1950), 226 S.W. (2) 425, and Galveston-Houston Electric Ry. Co. v. Reinle, 258 S.W. 803, (Tex.Sup.Ct.1924), largely relied on by appellee, reflect this situation. In fact, all the cases cited in this opinion are of this nature. The McKee case, supra, recognizes the requirements of control or no duty. See also:

> Gulf Oil Corp. v. Wright (C.A.5, 1956), 236 Fed. (2) 46, at 57.

Certainly appellant was not in control of the high-line, which was the danger element. It had no more right to ask the electric company to cut off the power, as appellee insists it should have done, than did Peachee Drilling Company or the appellee, himself, and it certainly had no duty to do so.

We therefore hold that appellant owed no duty to appellee to warn him of the danger, even though same could be considered a hidden danger, or to protect him otherwise. In the Union Tank Co. case, supra, Judge Hutcheson says, when speaking on this subject:

> "We agree, too, that under the undisputed facts, the duty was on plaintiff's employer and not on the defendant to warn plaintiff of the dangers of working with steel at night and to furnish

him with adequate lighting and that if there was any negligence in the discharge of this duty, it was the negligence not of defendant but of Wimberley, plaintiff's employer, and it was error for the court to charge these issues to the jury."

In that case Judge Hutcheson further held that, for the above reason, the general contractor was under no duty to furnish lights, even though the work was being done at night. He held that if lights were necessary, it was the place and duty of the plaintiff's employer to furnish them, and not the general contractor's.

Furthermore, this was not intrinsically dangerous work, nor was the place to work intrinsically dangerous. It only became dangerous by the manner in which the work was performed:

Texas Electric Service Co. v. Holt, supra;
Humble Oil & Ref. Co. v. Bell, (El Paso Civ.App. 1943), 180 S.W. (2) 970, err.ref., 181 S.W. (2) 569;
West Texas Utilities Co. v. Harris, (Eastland Civ.App.1950, err.ref. n.r.e.), 231 S.W. (2) 558.

The fact that the hole was drilled and the work completed without incident is positive proof that the work was not, within itself, dangerous. True it is that working with electricity, or highlines, is intrinsically dangerous, but this work did not entail the working with or use of electric lines. All that was required of the workmen was to use the slightest degree of care not to come in contact with the line. Therefore, we hold that the danger arose from the manner in which

the work was performed, and that the danger was transitory, and, therefore, the appellant is not liable. Very similar and very persuasive is Schwarz v. General Electric Realty Corp., 132 N.E. (2) 133 (Ohio Ct.App. 1954), affirmed 126 N.E. (2) 906 (Ohio Sup.Ct.1955). Furthermore, the doctrine of liability for inherently dangerous work is not involved in this case. It is well settled that an employee of an independent contractor is not a "third person" within the rule that an employer of an independent contractor is liable to third persons for the negligence of the independent contractor in the performance of work that is inherently dangerous:

> Humble Oil & Ref. Co. v. Bell, 180 S.W. (2) 970 (El Paso Civ.App.1943), writ of error refused, 181 S.W. (2) 569, (Tex.Sup.Ct.1944);
>
> Cagle v. McQueen, 200 Fed. (2) 186 (C.C.A., 5th Circ. 1953).

There is no special rule which would create a greater duty to appellee because the work in which he was engaged or the place where he was working was "intrinsically" or "inherently" dangerous. On the contrary, such findings tend to negative any duty that might otherwise exist, in that such dangers would be more obvious, and both appellee and D. A. Peachee Drilling Company would be charged with knowledge thereof.

We thoroughly sympathize with the plight of the appellee, as the jury evidently did, but a careful reading of the record as a whole, and especially appellee's testimony, leads to the inevitable conclusion that

Greer evidently forgot about the highline, temporarily, and lowered the mast into it, when such action was not necessary at all. Appellee himself testified that had not Greer committed this act of extreme negligence, he (appellee) would have gotten in the truck and backed it up, and nothing would have happened. The undisputed evidence also shows that the mast could not come down automatically or of its own accord, but that certain pins had to be pulled and a lever manipulated before it would be lowered, and, as shown above, appellee, at one place said the accident could not have happened any way other than by Greer deliberately lowering the mast into the wires. The undisputed evidence is that after the accident, the mast was against the wire and the pins had been pulled.

Therefore, we find it is established by the great preponderance of the evidence, if not the undisputed evidence, and by the testimony of the appellee himself, that Greer lowered the mast into the high power line. The conclusion is then inescapable that this action on the part of Greer was a new and independent agency, and an unexpected and unforeseen act, and was, as a matter of law, the sole proximate cause of the injury. Wherefore, appellant is not liable.

Appellant argues rather convincingly that appellee is guilty of contributory negligence as a matter of law, because he admitted that he drove the truck up to its position facing north, whereas he could have faced it south, east, or west, and the mast, when lowered, would not have touched the highline, etc. (The evidence is conflicting as to these directions, but

undisputed that three were safe, and he chose the one that was dangerous.) We are inclined to accept this theory of appellant's, but we cannot hold that such action was a proximate cause in this case because we consider the action of Greer the sole proximate cause, as above indicated:

West Texas Utilities v. Harris, supra.

For all of the above reasons, jointly and severally, we hold that the trial court was in error in not granting appellant's motion for an instructed verdict, and it becomes our duty to reverse this case.

Wherefore, said cause is reversed and rendered in favor of appellant, Nance Exploration Company, defendant in the trial court.

(signed) Holvey Williams
Holvey Williams, Associate Justice

CLERK'S OFFICE

COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL
DISTRICT OF TEXAS

October 9th., 1958.

El Paso, Texas

I, E. J. Redding, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, at El Paso, do hereby certify that the preceding 12 pages contain a true and correct copy of the opinion of the Court of Civil Appeals, delivered by Honorable Jolvey Williams, A. J., on the 31st., day of July, A. D. 1957, in cause No. 5226 Nance Exploration Company, Appellant, vs. Texas Employers' Insurance Association, et al., Appellees, now on file in my office at El Paso.

IN TESTIMONY WHEREOF, I have hereunto set my hand with the seal of said court, the same day and date above written.

E. J. Redding, Clerk
By /s/ H. L. Potter Deputy

[SEAL]